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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 993

PAUL E. MOORE AND VIOLA H. MOORE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Paul E. Moore and Viola H. Moore, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 14, 1958.

Citations of Opinions Below

The District Court did not write or file an opinion. The opinion of the Court of Appeals, printed in Appendix "B" hereto, inifra, pp. 12-27, (R. 500-514).

Jurisdiction

The judgment of the Court of Appeals was entered on March 18, 1958 (R. 515, p. 26, infra; opinion R. 500-514, pp. 12-27, infra). A timely petition for rehearing filed April 5, 1958 (R. 516) was denied April 14, 1958 (R. 533, p. 27, infra). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1), and Supreme Court Rule 22(2).

Questions Presented

1. Whether, in the prosecution of a case alleging willful and knowing attempt to evade a large part of income tax due by filing a false and fraudulent return, defendants, who took the stand in their own defense, and also offered undisputed testimony as to reputations for long years of good character, were entitled to have the trial court, on objection and request, charge the jury in connection with the evidence as to good character of defendants, that character testimony may be such that it, alone, might create a reasonable doubt, although without it the other evidence would be convincing; and whether refusal to so charge is particularly erroneous where guilty or innocent knowledge and intent depends upon the conflicting testimony of the defendants and acknowledged accomplice witnesses.

It is petitioners' contention in this regard that it is not enough to charge the jury that they shall consider the character testimony in connection with all of the testimony in the case in resolving the question

of reasonable doubt, but the charge must go further and instruct that the circumstances may be such that established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, other evidence would be convincing. *Edgington v. United States*, 164 U. S. 361; *Michelson v. United States*, 335 U. S. 469; *Hayes v. United States, (10th Cir.) 227 F. 2d 540;* and *Holland v. United States, (5th Cir.) 245 F. 2d 341*, decided June 21, 1957, and expressly overruled by this same Court of Appeals for the Fifth Circuit in our case on March 18, 1958.

2. Whether, in any case, it is error to give the incorrect definition of reasonable doubt expressly disapproved by the Supreme Court in *Holland v. United States, 348 U. S. 121*, as "that degree of certainty that would lead you to act on the faith of it in the more important and critical affairs of your own life."

It is the petitioners' contention that, since *Holland* (p. 140) has held that the correct statement of the business test as to reasonable doubt "should have been in terms of the kind of doubt that would make a person hesitate to act, see *Bishop v. United States, 71 App. D. C. 132, 107 F. 2d 297, 303*, rather than the kind on which he would be willing to act", then the Trial Court, having before it the correct definition laid down by the Supreme Court, should have, upon objection and request, given the correct definition.

It is petitioners' contention that, since the Supreme Court has supervisory power over trials in the district court *(McNabb v. United States, 318 U. S. 332,)* then, where correct definition has been established

by this Court as part of the adjective criminal law, the trial court should be required to apply such definition.

Statute Involved

The statutory provisions involved are:

(1) *26 U. S. C., Sec. 145 (b)*, in effect prior to The Revenue Act of 1954 (the alleged offenses having occurred prior to the 1945 Act), making any person guilty of an offense who willfully attempts in any manner to evade or defeat any tax imposed by the income tax provisions of the Internal Revenue Code. (The material portion of the statute is printed as Appendix "A", p. 11, infra).

Statement

The defendants, husband and wife, were jointly indicated under three identical counts, except as to years and amounts, for alleged income tax evasions for the years 1950, 1951, and 1952. (Count One for 1950, R. 2, is printed in Appendix "C", p. 28, infra).

Both defendants were convicted on all three counts of the indictment (R. 456); and they were sentenced by the Court, the prison sentence of the wife being probated (R., pp. 468-470).

There is no substantial dispute that the income tax returns incorrectly reflected the true taxes due. This petitioners concede, and so conceded in the trial court and in the Court of Appeals.

Petitioners neither kept their books nor prepared the tax returns. The books were kept and the re-

turns filed for the respective years by their accountants, Vetterling and Danforth. The guilty intent of the defendants depends upon the testimony of the witness, Vetterling, that he deliberately falsified the return for 1950, at the defendants' direction, and the testimony of Danforth that he made the returns out for 1951 and 1952 different from what was shown by the books in order to reflect what he and defendants considered represented the true income. (See opinion of Court, infra, p. 19).

The trial Court submitted to the jury defensive theories based upon mistakes of the accountants, lack of knowledge of defendants, and defendants' bona fide belief that because of inflated allowances on used cars the totals on the books did not reflect true earnings. (Appendix "C", p. 29, infra; R. 443-444).

The guilt or innocence of the petitioners depended upon the conflict between their testimony and that of Danforth and Vetterling and Vetterling's wife. (See Court's opinion, infra p. 19).

The defendants established an unquestionable reputation as law abiding citizens, for honest and fair dealings, and for truth and veracity over a period of thirty-five years from witnesses who had known them for that period of time: Ralph David, banker (.54); Frank Reiman a government witness, official of General Motors, (R. 71); Marion Elbert Mayo, a beer distributor, (R. 215-216); J. E. Walston, certified public accoutant, (R. 216-218); Mark Sellers, insurance and real estate agent, (R. 224); W. C. Greer, U. S. Collector of Customs at Freeport, Texas, (R. 225-226); Arthur Stewart, col-

lege professor at Texas A & M College, (R. 273-274); and John M. Barron, state District Attorney, (R. 274-276).

The defendants requested the Court to charge the jury that under some circumstances established reputation for good character, if relevant, would alone create a reasonable doubt, although, without it, other evidence would be convincing. (R. 423, appendix "C", p. 30, infra). The request was refused.

The defendants also requested the trial court, in connection with the definition of reasonable doubt to correct its charge, and make the test such a doubt as would cause one to hesitate to act rather than such a doubt as would lead one to act in the more important and critical affairs of your own life. (R. 427, Appendix "C", p. 31, infra).

The Court refused to change the charge and gave it as objected to. (R. 455, Appendix "C", p. 32, infra).

Reasons for Granting the Writ

1. In holding that the petitioners were not entitled to the charge on character testimony, in effect that " the circumstances may be such that established reputation for good character, if it is relevant to to the issue, would alone create a reasonable doubt, although, without it, other evidence would be convincing", the Court of Appeals in this case is in conflict with the opinions of the Supreme Court in *Edgington v. United States, 164 U. S. 361;* and *Michelson v. United States, 335 U. S. 469, 476.*

In those opinions the Supreme Court "has held that such testimony alone, in some circumstances,

may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed". *(335 U. S., at p. 476,* citing *Edgington v. United States, supra.)*

The opinion of the Court of Appeals for the Fifth Circuit in this *Moore Case* also is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in *Hayes v. United States, (10th Cir.) 227 F. 2d 540* on this same question. The *Hayes Case* follows *Edgington* and *Michelson* by the Supreme Court.

The *Hayes Case*, like our *Moore Case*, was an income tax case and was decided alone on this very point, and it is directly in conflict with the holding of the Court of Appeals in our case.

It is significant that the Fifth Circuit, in *Holland v. United States, (5th Cir.) 245 F. 2d 341*, itself, expressly followed and relied upon the *Hayes Case* (as well as *Edgington* and *Michelson* by the Supreme Court) and announced the same and correct rule. And it is ironical that in June, 1957, when *Holland (5th Cir.)* was decided but not reported, while the Moores (petitioners) were being tried, the rule had been firmly (?) established in the Fifth Circuit by *Holland* that the defendants were entitled to the charge on character testimony. But when *Moore* (this case) was decided in March, 1958, the Court changed its mind and by name expressly overruled *Holland v. United States, (5th Cir.) 245 F. 2d 341*, and refused to follow *Hayes v. United States, (10th Cir.) 227 F. 2d 540.*

The conflict between *Hayes* by the Tenth Circuit, decided so recently on November 2, 1955, and this

Moore Case by the Fifth Circuit, has created a hopeless confusion in the administraton of the adjective criminal law in the Federal Courts. Particularly is this true in view of the fact that the Fifth Circuit so recently as ten months ago in so clear an opinion as *Holland* had taken the *Hayes* view directly opposite to its present holding in *Moore*.

Only the Supreme Court can resolve this conflict. This matter has long been in dispute in the Circuits (See: *Holland v. United States, (5th Cir.) 245 F. 2d, at p. 343)*, and the Supreme Court should act to establish a uniform rule for all the Circuits, so that defendants may be entitled to, and may receive, like and impartial treatment in all Federal courts.

2. The Court of Appeals, and the District Court, upon direct and express request of defendants, refused to apply the correct business definition of reasonable doubt announced in *Holland v. United States, 348 U. S. 521, 141*, (a different case from overruled *Holland, Fifth Circuit.)*

In *Holland* (at p. 141), Justice Clark says:

"Even more insistent is the petitioners' attack, not made below, on the charge of the trial judge as to the reasonable doubt. He defined it as 'the kind of doubt . . . which you folks in the more serious and important affairs of your lives might be willing to act upon'. We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, see Bishop v. United States, 71 App. D. C. 132, 107 F. 2d 297, 303. rather than the kind on which he would be willing to act."

The Supreme Court did not reverse *Holland.*

The point was not raised below. The Supreme Court had not theretofore stated the correct rule for guidance of the Federal Courts, although it was well recognized by the cases and texts. *(1 Underhill's Criminal Evidence, (5th Ed.) Sec. 27, p. 35, note 38;* and *1 Wharton's Criminal Evidence, (12 Ed.) Sec. 12, p. 33.*

A serious matter of adjective criminal law is involved, and when the Supreme Court establishes a rule or correct definition of a legal term in its supervision of the administration of the criminal law in the Federal Courts, trial courts should not be permitted to ignore the rule or definition and deny defendants the benefit of it. Particularly is this true where the Supreme Court's definition is specifically called to the trial court's attention from the opinion of the court.

Petitioners concede that the Court need not have defined reasonable doubt. In fact, the record shows that the defendant preferred that the Court not do so. As stated in *Holland*, to do so, seemed to defendants, "to create confusion rather than misapprehension". But if the charge was to be given, it should have been properly given and not in such a manner as to prejudicially confuse defendants' rights to a reasonable doubt.

A charge on reasonable doubt is almost universally given in Federal courts under the business test. *Holland* has not stopped it, nor, because the case was not reversed, has *Holland* succeeded in correcting the definition. Only, the Supreme Court can act di-

rectly to require the Courts, if the business test is to be given, to give the correct test as announced by the Supreme Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

STATUTE CITED

(Material Portions)

(1) 26 U. S. C. 145 (Prior to Revenue Act of 1954).

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in additiion to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

APPENDIX "B"

No. 16304

PAUL E. MOORE and VIOLA H. MOORE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(March 18, 1958.)

Before JONES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: This is an appeal by defendants, husband and wife, from convictions on a jury verdict of guilt for willful evasion of income taxes by filing false and fraudulent returns for the years 1950, 1951 and 1952. There is a frontal attack that for neither of the years is the evidence sufficent. Several less decisive attacks are made urging procedural errors requiring a new trial.

This is not the case of a wife, unwillng, reluctant, or acquiescent in her husband's demands, who finds herself criminally liable merely for the acts of her husband attributed to her. For here the Moores, owners and operators of the Pontiac automobile dealership in Freeport, Texas, were both active in

the business and most, if not all, of the bookkeeping accounting activities were, as between the two of them, the immediate responsibility of Mrs. Moore. Nor is this case one of that kind so endemic in which the pressures of the net-worth method are brought to bear. For by indictment, bill of particulars and proof, the Government undertook to show willful error in specific items by which income was understated, cost of sales misrepresented, or operating expenses exaggerated, or combinations of two of them. Perhaps even more unique, the element of willful, fraudulent purpose, normally an inference from circumstances, was here, certainly as to 1950, proved directly by categorical admissions of culpability by defendants' accountant with much the same testimony coming from the other accountant who prepared the 1951, 1952 returns.

The substantive complaint of the Court's failure to grant defendants' motion for judgment of acquittal boils down to these points. As to 1950: the evidence did not adequately show that the extract copy of the 1950 return was a correct copy of the return as filed, and the element of incorrectness and willfullness rested wholly on testimony of the accountant, a self-confessed felon. As to 1951: admittedly the return, as filed, was not signed by defendants and there was no evidence to show that its contents were know to them. As to 1951 and 1952: since the accountant Danforth, who prepared the returns, testified that he thought they correctly reflected income, there was no evidence of fraudulent filing. As to all three years, 1950, 1951, 1952: the evidence merely showed that the income reported in the re-

turns varied substantially from that shown in the account books of the business with no proof that the books were correct. In our view none of these contentions is sound.

The orignal 1950 return was not introduced. The evidence, however, demonstrated without qualification that it could not be because it had been destroyed in the fire of the warehouse in which returns had been stored by the District Director. Once the original was accounted for, there was likewise sufficient proof of its contents. The Revenue Agent who made the initial investigation in November 1953 testified that he requested,[1] and Mrs. Moore furnished him, a penciled retained copy of the 1950 return. From this penciled Taxpayers' retained copy, he made extracts from which he prepared the typed "dummy" copy[2] used on the trial. That this was fair and adequate proof that defendants had filed such a return was overwhelmingly established by impressive facts,[3] both extrinsic and intrinsic.

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[1] He was making a routine audit of the 1951 return, but when the comparison of that return and the books showed such marked discrepancy, he made a check as to the other two years and for this, initially at least, inspected and used Taxpayer's retained copies which they furnished to him.

[2] This contained the totals and sub-totals from the tax return form and attached schedules showing gross sales, inventories, cost of goods sold, operating expenses, and taxable income.

[3] The reconstructed return showed a tax due of $1,453.28 against which Taxpayers took as an offsetting credit an overpayment of $218.08 from 1949 with a resulting cash payment of $1,235.20. The District Director's certificate of assessments covering 1949 through 1952 showed that defendants were entitled to a 1949 tax credit of $218.08, and that the 1950 tax had been paid by Taxpayer taking the credit and remitting the balance by check with the 1950 return, the check and return both being stamped with the

There is even less to the objections covering the form of the 1951 return. The original (or agreed photostat) was introduced. While it was not signed by either Mr. or Mrs. Moore, the accountant, Danforth, testified that it appeared to be the one prepared by him and, in any case, extrinsic and intrinsic facts[4] again overwhelmingly established it was the return submitted by defendants.

The *fact* of a filing by defenadtns of the return for 1950, and the return for 1951 showing the taxable income and income tax due and paid thereon, was thus adequately established. No such issues arise as to the 1952 return. We turn then to the questions whether, assuming this to have been established, there was sufficient evidence to show that

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routine serial number 3131685. A photostat of the Taxpayer's check, signed by Mrs. Moore, dated January 15, 1951, in the precise amount of 51,235.20 bears the stamped number "3131685."

Whatever infirmities there might have been earlier, they were all cured when defendants, in their case, introduced and identified the penciled retained copy of the 1950 return from which the Agent made his extract. The totals and sub-totals on the extract "dummy" copy corresponded exactly.

[4] The District Director's certificate of assessments, see note 3, supra, showed that the tax due, $1,499.89 (the amount shown on the return) was paid February 20, 1952, under serial No. 2060172. Both the photostat of Taxpayer's check, dated January 15, 1952, in the amount of $1,499.89, signed by Mrs. Moore, and the return, bore this serial number stamp "3060172." In addition, and attached to the return as introduced, was the claim filed July 23, 1952, signed by Taxpayers seeking refund of $106.21 for overpayment due to erroneous calculation of income for self-employment withholding tax. This claim specifically identified and referred to the 1951 return and the requested refund ($106.21) shows it was based on the specified figures taken from the return.

defendants knew of the contents, knew that the true income was something else, and then willfully filed the false returns to defraud the Government?

Since the asserted incorrectness of reported income for all three years is based on the Taxpayers' books, it simplifies matters to outline this generally before discussing any specific complaints on the proof of 1950 or 1951-1952 violations.

The Moores began this business in late 1949. A Pontiac dealer is required to keep a standard set of books in a form and manner meticulously prescribed by General Motors. As neither of the Moores had training in this, they hired Vetterling, on a part time basis, for the period ending mid-1951 and Danforth (a one-time relative of Mrs. Moore) through 1952. If, as was the case here, the dealer obtained from GMAC "floor plan" financing of automobiles purchased from the manufacturer for resale, or made arrangemetns with it for the assignment of all or part of its conditonal sales contract paper covering cars sold at retail, it was necessary for the dealer to submit, under an express warranty of correctness, a periodic and annual report on GMAC accounting forms showing the true conditon of the business as reflected by the prescribed books of account. In addition, simlar periodic and annual reports had to be made to the Pontiac Division of General Motors on the prescribed forms. These were substantially the equivalent of a trial balance, a detailed profit and loss statement and a balance sheet showing precisely for comparative analysis, increase in net worth of the business.

The fact, so readily discovered by the Revenue Agent in the initial routine audit, that there was a substantial discrepancy[*] in the taxable income reported in the three returns and that shown by these elaborate books and reports, has not, nor can it ever be, denied. To escape this awful predicament, Taxpayers asserted a plea of good faith ignorance, but in refutation their main trust was put, not on facts, but on a legal theory. The legal theory is that while there was proof that there was a descrepancy as such, there was no proof that the accounts, as reflected in the books, rather than the accounts as reflected in the returns, were correct. Elaborating further, it was that since books of account are normally evidential only, *Sitterding v. Commissioner*, 4 *Cir.*, 80 F. 2d 939; *United States v. Berman*, D. C. Ga., 75 F. Supp. 789, 790, a taxpayer can be convicted, not for failing to pay tax on what the books show, but only on what the real income was. In translating that further into tangible terms, the Taxpayers, by urging the plea of good faith ignorance of what the accountants had done, took posi-

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[*]

	1950	1951	1952
Net Income per books	$24,886.69	$25,900.17	$26,419.92
Net Income per return	9,980.59	8,320.89	9,113.94
Difference not reported	$14,906.10	$17,579.28	$17,305.98
Tax due	$ 5,701.86	$ 6,835.08	$ 7,697.56
Tax paid	1,453.28	1,499.89	1,365.41
Deficiency in tax	$ 4,248.58	$ 5,335.19	$ 6,332.15

tions which may well have been considered by the jury as self-defeating, irreconciliably inconsistent[6] ones: (1) the books were incorrect so it was proper not to follow then in preparing the returns; (2) the books were correct, but the accountants did not advise Taxpayers that the books were not followed in preparing the returns.

But this legal theory collapsed in the face of a record which overwhelmingly supported the contrary conclusions implied by the verdicts of guilt. A major part of this refuting evidence serves double harness and satisfies as well the element that the false returns were knowingly submitted.

There was first the fact that the books recorded all of the transactions showing income and expenses of the business. And, it is another one of the ironic distinctions which set this case off as a unique one that, instead of proving that the books were in error, defendants' own expert witness, a Certified Public Accountant, testified that, except for two items in 1952, these books were correct and taxes, substanti-

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[6] Defendants requested and the Court gave specific instructions to the jury on both of these two special defenses. Where this left defendants is well described in the Government's brief: "One defense was that the discrepancies were the result of mistakes on the part of the bookkeeper and appellants never knew the discrepancies existed. The other was that they, in good faith, thought their books were wrong and, accordingly, reported less income on their returns, which they believed to be their true income. The latter probably would have had the best chance of success, but either defense, had they chosen it and stuck to it, would have been more convincing than seesawing between the two. Up until the time the case went to the jury, appellants had not yet decided whether they were oblivious to the discrepancies or whether they recognized them, but thought the returns correct."

ally in the amounts calculated by the Government to be due, were in fact due. The jury could also credit the strong suggestion that another set of accountants to whom the books were first submitted when the Special Agent entered the case, likewise could find nothing wrong with the books or the tax computations based on them.

The Revenue Agent checked and tested the books for the three years and found them to substantiate that which was reflected in the periodic and annual reports submitted to GMAC and General Motors. Both Vetterling and Danforth affirmed that the books correctly reflected the state of the business.

Where taxpayers obtain essential credit and procure the very inventory of merchandise which is the main stock in trade on the basis of books and records regularly kept in accordance with accepted accounting principles, the jury is entitled to conclude that such books are an accurate reflection of the business. It is not required, as defendants seem to assert, that the Government go back and reconstruct the books item by item, sale by sale, check by check, to establish anew that the books and records are correct.

Moreover, there is in the circumstances credited by the jury from Vetterling's testimony further corroboration. He (and his wife corroborated this in essential detail) stated that in January of 1951 he had prepared the 1950 return. As the filing deadline date was approaching (see note 3, supra), Mr. and Mrs. Moore came to his home on a Sunday morning to sign the return which Mrs. Vetterling had typed up. The return was based on the books and record which had been kept for the Moores by Vetterling.

When Mr. Moore saw the proposed return, he was indignant and outspoken. He refused to sign the return and said the tax should be about $1300 to $1400. When Vetterling told him that that could not be done without falsifying the return, Moore, in effect, told Vetterling that that was Moore's worry, not his. A new return was then prepared by Vetterling making arbitrary adjustments in the Moores' presence, signed by the two of them, the inital return and all work papers torn up and the remanents taken away by Mr. Moore.

Danforth, the accountant who succeeded Vetterling, was not so strong. But for 1951 and 1952, he testified that Moore told him that the business had not earned the profits shown by the periodic reports, and in preparing the returns, he should use figures substantially the same as for the preceding year.

In additon, the jury had the right to impute to the defendant an admission-agreement that the books were correct. On the completion of the Agent's aduit, a statement of a proposed deficiency was submitted for the assessment of additonal taxes in almost the identical aggregate of the three counts of the indictment. Taxpayers, while insistng at that time that they had not made that much money, nevertheless submitted a special formal offer[7] to pay the proposed deficiency which was subsequently declined by the Commissoner.

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[7] On pretrial motion of defendants, the Court instructed the Government to make no reference to this abortive settlement. Silence was kept until defendants purposely opened up the inquiry and acknowledged that it was then in the case for all purposes.

Likewise the jury had the opportunity to determine for itself whether the reason continually pressed by Taxpayers as the major cause for the books being incorrect had either substance in fact or was asserted in good faith. As justifiication for the instructions which Danforth testified they gave to him, and as an explanation why they had not followed the books in having the returns prepared, the Moores personally and through Danforth testified that the books did not correctly reflect income because of excessive allowances on the trade-in of used cars in the sale of new automobiles.[8]

This theory, though expressly submitted to, was presumably rejected by the jury. Not the least reason may well have been the fact that whether excessive or not, whatever was allowed was entered in the books and was taken into account in all subsequent transactions. While an inflated value might temporarily swell assets, it was, on the records, the cost of that used car. If a car, so valued, was sold, there was an automatic loss to the extent that the resale price was less than the initial tradein. And, in any case, the books showed, and Moore readiliy acknowledged, that each December the inventory of used cars was reappraised, and inventory value written off so far that December, in contrast to the other months of substantial profits, invariably showed a marked loss.

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[8] The record bears out the contention that to meet currently imposed Federal war-time restrictions on installment credit requiring a substantial (one-third) down paymet, the common practice was to inflate the stated "paper" value of the used car.

The jury was entitled, of course, in its everyday cumulative wisdom to think that a businessman, asserting the doubtful correctness of his books, would have the means of demonstrating it, and if the explanation failed[9] in content, that that inferentially went far toward establishing correctness, and certainly in indicating a lack of good faith.

To this the jury could add a further circumstance, plain and simple in its obvious existence, and having profound relevance in the business world. The uncontradicted fact was that instead of this being a business which remained static (as would have been the case had net profits remained the same each year as that reported for 1950), it was a business of marked growth with an increase of over 400% in net worth and 800% in cash.[10]

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[9] This might also have been the fate of the similar plea of innocent ignorance in which it was urged that these inexperienced, untutored, self-made laymen were dependent altogether on the accountants as experts. This, too, was expressly submitted to the jury on a record which abundantly raised the issue. But cross examination of Mr. Moore concerning the periodic GMAC and GM reports warranted the jury's concluding that he did in fact know the meaning and significance of the items in the balance sheet. (e.g., "cash," "contracts in transit," "new cars," "used cars") and the resulting figure in the profit and loss statement, and especially the latter which,, he stated, he always looked at to see whether they had made or lost money.

[10] These figures are for the year ending:

	1949	1950	1951	1952
Cash in Bank	$ 6,742.03	$ 8,818.99	$23,919.27	$46,600.52
Net working Capital	17,438.89	30,512.33	50,553.16	77,539.18
Total net worth	22,857.78	44,444.47	69,109.44	97,720.22

By Bill of Particulars the Government stated that its

Once substantial correctness of the books was established, there was was ample basis for the finding that returns incorrectly showing different taxable income were willfully filed with fraudulent intent. Vetterling's testimony, while categorically refuted by the Moores, showed, if accepted, a deliberate unlawful purpose. The jury could read Danforth the same way, for it was not required to accept the self-serving protestations that he was not intentionally falsifying the returns and thought that the Moores were correct when they stated to him each year that they had not made the profit indicated on the periodic reports. What[11] he did may have drown-

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proof would be of specific items and that evidence of increases in net worth might be used "by way of corroboration or rebuttal but no such * * * method will be relied upon in itself as estab'ishing an additional tax due and owing." The use of this evidence, coming both from the books and bank accounts all of which was received without objection, was within this purpose to establish correctness of the books. The Court did not, as defendants contend, err in declining to instruct the jury that this could be considered on "intent" only. Since these figures came from the detailed periodic reports which reflected all changes, upwards or downwards, in all liabilities as well as assets, it was not a distorted picture as in United States v. Venuto, 3 Cir., 182 F. 2d 519, 523.

[11] The following changes were made by Danforth to produce an income tax similar to 1950's:

1951	Per Books and Periodic Reports	Reported in Return	Difference in Taxpayers' Favor
Sales	$317,865.48	$311,865.48	$ 6,000.00
Miscl. Income	1,079.28	—0—	1,079.28
			$ 7,079.28

Operating Expenses:

Used Car Reconditioning	$ 353.45	$ 1,353.21	$ 5,000.00 ?
Company Car Expense	353.45	1,353.45	1,000;00
Legal & Auditing	1,003.10	2,003.10	1,000.00
Freight & Postage	229.76	729.76	500.00
Insurance	723.20	1,723.20	1,000.00
Discounts given	149.84	649.84	500.00
Interest Expense	396.07	896.07	500.00
Other Shop Supplies	967.88	1,467.88	500.00
Difference in Taxable Income			$10,500.00

—1951	Per Books and Periodic Reports	Reported in Return	Difference in Taxpayers' Favor
Total Difference in Taxpayers' Favor for 1951			$17,579.28
1952			
Sales	$362,835.28	$362,835.28	$ —0—
Cost of Goods Sold	307,303.02	312,303.02	5,000.00
Miscl. Income	1,144.51	——0——	1,144.51
			$ 6,144.51

Operating Expenses:

Similar to 1951; Difference in six items of an even $1,000 each and other differences (one raising cost of used car reconditioning from $0.00 to $4,715.18) totaling	11,161.47
Difference in Taxpayers' Favor for 1952	$17,305.98

ed out the sound of what he said, and in so doing, it established as well specific omissions and misstatements of income and expenses.

When it comes to procedural errors, none require reversal. It was not error to refuse the requested instruction that the jury, in weighing the testimony of the Vetterlings and Danforth should "take into consideration the very keen interest that said witnesses have in giving the testimony they gave." Full instructions treating these witnesses as accomplices and giving the jury the usual precautions for receiving such evidence ,as well as general and specific charges concerning bias or hostility of any witness were given. We cannot discern how Vetterling had a "keen interet's' in categorically confessing to a deliberate falsification of a return. Nor was Danforth aided or his interest advanced in any way by his testimony.

The instruction on "reasonable doubt" while subject precisely to the infirmities of the one criticized in *Holland v. United States*, 348 U.S. 121, 141, 95 L. Ed. 150, 167, does not, again for the reasons pointed out in that very case, present a situation, on this record, of harmful effect. Fed. Rules Crim. Proc. 52(a).

The final point concerns the objections to the charge as given and the refusal of the Court to grant a requested charge on evidence of good reputation. The Court gave one in substantial accord with our prior decisons, *Le More v. United States*, 5 Cir., 253 F. 887, cert. den. 248 U. S. 583, 63 L.ed. 434, and *Grace v. United States*, 5 Cir., 4 F. 2d 658, cert. den. 268 U. S. 702, 69 L.ed. 1165, unaware at the time

of the trial of our decision in *Holland v. United States*, 5 Cir., 245 F. 2d 341, which was not published until after the trial. In this record with its devastating facts, both direct and circumstantial, we would not have reached a conclusion that any such difference in the wording between the requested and given instructions could have had any harmful effect. *United States v. Kushner*, 2 Cir., 135 F. 2d 668, cert. den. 320 U. S. 212, 87, Le.ed 1850. Nevertheless, since trial courts are entitled to guides as clear as can be fashioned, we think it unsound to undertake any comparative analysis of the instructions here requested in contrast to those given by the Court or those crititized in *Holland*. Rather we should state plainly that in *Holland* neither by brief nor argument were our prior decisions in *Le More* and *Grace* called to our attention. Those cases represent the law in this Circuit, see *Kriener v. United States*, 2 Cir., 11 F. 2d 722, at 726, cert. den. 271 U. S. 688, 70, L.ed. 1152. The contrary holding in *Holland* is disapproved so that these two prior decisions continue their vitality

AFFIRMED.

JUDGMENT.

Extracts from the Minutes of March 18, 1958.

PAUL E. MOORE and VIOLA H. MOORE,

No. 16804.

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Record Page No. 515

ORDER DENYING REHEARING

Extract from the Minutes of April 14, 1958.

PAUL E. MOORE and VIOLA H. MOORE,

No. 16804.

versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Record Page No. 533

APPENDIX "C"

(1) **Material Portions of Indictment:**

First Count

"The grand jury charges:

"That on or about February 2, 1951, in the Western District of Texas, PAUL E. MOORE and VIOLA H. MOORE, late of Freeport, Texas, acting jointly and severally, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by them to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Texas, a Austin, a false and frauludent income tax return wherein they stated that their net income for said calendar year, computed on the community property basis, was the sum of $8,982.53 and that the amount of tax due and owing thereon was the sum of $1,453.28, whereas, as they then and there well knew, their net income for the said calendar year, computed on the community property basis, was the sum of $23,886.69, upon which said net income they owed to the United States of America an income tax of $5,701.86.

"In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b)."

(2) **Portion of Court's Charge Submitting Defendants' Defenses:**

"One of the defenses relied upon by defendants in this case is that any discrepancies between the 1950, '51, and '52 income tax returns and the books as kept by the defendants' auditors in this case resulted from the negligence and carelessness of said accountants and bookkeepers, and resulted through mistake on the part of said accountants and bookkeepers and that the defendants, and neither of them, had any knowledge of such negligence or such mistakes, and that the defendants signed and filed the income tax returns without such knowledge. Now, if you believe from the evidence, or if you have a reasonable doubt thereof that the auditors and bookkeepers of the defendants in preparing the income tax returns for 1950, '51, and '52, or either of them, were guilty of negligence, carlessness or mistake, which resulted in discrepancies between such returns and the books of the defendants kept by said auditors and bookkeepers, and that the defendants, or either of them, did not have knowledge of such negligence or mistake of such auditors and bookkeepers, and signed and filed said returns without such knowledge, then you will acquit the defendants and say by your verdict 'not guilty.'

"One of the defenses relied upon by the defendants in this case is that they bona fidely and in good faith believed and thought that their true income for the years 1950, '51, and '52, respectively, would be and was reduced because of the inflated values of second-hand cars received as part payment for new cars sold, and because of the loss resulting from such inflated values, and because of such belief as to such loss resulting therefrom they were

of the good faith opinion that the income tax returns for 1950, '51, and '52, signed and filed by them correctly stated their true income for said years. Now, if you believe from the evidence, or if you have a reasonable doubt thereof, that the defendants did bona fidely and in good faith believe that their true income was reduced because of the inflated values placed on second-hand cars received as payment in sales of new cars and the resulting loss therefrom, and that they in good faith believed that the income tax returns signed and filed by them as aforesaid correctly stated their true income, and signed the returns so believing, then you will acquit the defendants and say by your verdict 'not guilty.' "

(3) **Objection and Request and Court's Charge on Character Testimony:**

The defendants made the following request as to the Court's charge on character testimony:

"MR. COFER: Defendants' good character. In connection with the Court's charge with reference to the defendants' good character and their character witnesses, the defendants request the additional charge and instructions or charge and instructions to this effect:

" 'You are instructed that good character, when considered in connection with other evidence in this case, may generate a reasonable doubt. The circumstances may be such that established reputation for character, if it's relevant to the issue, would alone

create a reasonable doubt, although, without it, other evidence would be convincing.'

"THE COURT: I won't give that."

The Court charged the jury on character testimony as follows:

"In this case testimony has been offered as to the good character of the defendants on trial, and you are advised that evidence of good character, if you find it proven in this case, is evidence in favor of the defendant possessing it. You are further advised that testimony of good character is competent testimony and that you shall take it and consider it, and give it such weight as appeals to your judgment under your oaths as jurors, and when considered in connection with all of the testimony in the case, if you are not then satisfied beyond a reasonable doubt of the charges against them, it is your duty to acquit them."

(4) **On Definition of "Reasonable Doubt":**

Defendants' objection as to "reasonable doubt":

"MR. COFER: On reasonable doubt, this is what Judge Clark says: 'We think this section of the charge should have been in the terms of kind of doubt that would make a person hesitate to act.' We object to the portion of the charge on reasonable doubt where it says: 'If, having weighed the evidence on both sides, you reach a conclusion that the defendant is guilty to that degree of certainty

that would lead you to act on the faith of it in the more important and critical affairs of your own life, you may properly convict; otherwise not.' We'd like to read and request the Court to change that to read, if the business test is to be given:

" 'If, having weighed the evidence on both sides, you reach a conclusion that you have doubt of the defendant's guilt to that degree that would lead you to hesitate to act on the faith of it in the most important and critical affairs of your life and cause you to fail to act, you should acquit the defendant.' "

The Court gave the following charge as to "reasonable doubt":

"Now, gentlemen, a reasonable doubt is what the term implies, is a doubt founded upon reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason. If, having weighed the evidence on both sides, you gentlemen reach the conclusion that the defendant or defendants are guilty to that degree of certainty that would lead you to act on the faith of it in the more important and critical affffairs of your own life, you may properly convict; otherwise not."

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No. 993

IN THE

Supreme Court of the United States

October Term, 1957

PAUL E. MOORE AND VIOLA H. MOORE, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 12-26) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1958 (Pet. 26-27) and a petition for rehearing was denied on April 14, 1958 (Pet. 27). The petition for a writ of certiorari was filed on May 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the trial court erred in refusing to give a requested instruction that "established reputation for good character" might "alone create a reasonable doubt, although, without it, other evidence would be convincing."

2. Whether the trial court erred in explaining the concept of reasonable doubt to the jury.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1952 ed., Sec. 145 (b).)

STATEMENT

In December, 1955, petitioners, husband and wife, were charged in a three-count indictment filed in the Western District of Texas with having willfully attempted to evade and defeat their individual income taxes for the years 1950, 1951 and 1952, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 2-4.) The indictment alleged that the amounts of net income and income tax declared by petitioners on their (joint) returns compared with the true amounts as follows (R. 2-4):

	Net Income		Income Tax	
Year	Reported	Corrected	Reported	Corrected
1950	$ 8,982.53	$23,886.69	$1,453.28	$ 5,701.86
1951	7,188.80	24,900.17	1,328.68	6,835.08
1952	8,202.55	25,419.92	1,380.62	7,697.56
Totals	$24,673.88	$74,206.78	$4,162.58	$20,234.50

After a jury trial, petitioners were found guilty on all three counts. (R. 456.) On July 17, 1957, the court imposed a fine of $1,500 on Mrs. Moore "on all counts generally" and a prison sentence of one year. The prison sentence was suspended and she was placed on probation for three years. (R. 460.) Mr. Moore was fined $2,500 on each count, and sentenced to consecutive one-year prison terms on each count. The prison sentences with respect to counts 2 and 3 were suspended and Moore was placed on probation for three years, to begin upon completion of service of the sentence imposed on count 1. (R. 460-461.)

The evidence to support the verdict, the sufficiency

of which is not challenged, may be summarized briefly as follows:

During the prosecution years, petitioner Paul Moore owned and operated an automobile agency in Freeport, Texas, engaging in the purchase and sale of new and used cars. (R. 171, 315.) Although the business included a service department, most of the profit came from the sale of new cars. (R. 338-339.) Mr. Moore worked mainly on the buying and selling of cars, and his wife worked in the office. Both wrote checks on the business bank account. (R. 164-165.) The business maintained the standard accounting system prescribed by the General Motors Corporation for its dealers, and it filed monthly financial statements as required by that Corporation. (R. 69, 77, 138-139, 254.) These monthly statements were in agreement with petitioners' books. (R. 86-87.) The investigating agents made test checks to ascertain the reliability of the books, and they found that every item examined was properly entered from the original sources of information and properly carried to the ledger. (R. 87.)

The Government established by direct evidence the precise amount of unreported income alleged in the indictment with respect to each year. The differences between the income and expense as shown on the books (and monthly financial statements) and the amounts shown on the income tax returns are as follows (R. 87-94, 201-209):

	1950	1951	1952
Sales understated		$ 6,000.00	
Miscellaneous income understated	$ 703.44	1,079.28	$ 1,144.51
Cost of sales overstated	8,124.25		5,000.00
Operating expenses overstated[1]	6,078.41	10,500.00	11,161.47
Unreported adjusted gross income	$14,906.10	17,579.28	17,305.98
Less: Standard deduction understated	1.94	167.91	88.61
Unreported net income	$14,904.16	$17,411.37	$17,217.37

There was also direct evidence of petitioners' willfulness. One Vetterling, who had kept petitioners' books and prepared their 1950 tax return, testified that he had originally prepared a return from the books; that petitioners came to his home in January, 1951, for the purpose of signing it; that petitioner Paul Moore "didn't like the amount of tax" shown on the return, which was "considerably more than the return that was finally sent in" (R. 172-174); that he told Vetterling he wanted the tax to run between $1,300 and $1,400, and requested Vetterling "to change figures, no matter where, to get the tax down" (R. 174); that "after a terrific argument" (R. 185) Vetterling did so, in the presence of both petitioners (R. 174); that a new return was typed up that same night, which both petitioners then signed (R. 175); that petitioner Paul Moore, in the presence of peti-

[1] The inflated expense figures were spread over various items. (R. 148, 204-209.)

tioner Viola Moore and Mr. and Mrs. Vetterling, then destroyed the return which Vetterling had originally prepared and all work sheets pertaining to it (R. 175-176); that Vetterling warned Mr. Moore that he might be in trouble if he filed the false return, and Moore replied that that "was his worry, not mine, or some words to that effect" (R. 177); that, the following month, Vetterling expressed a desire to terminate his employment with Moore; and that he did do so several months later (R. 177). Vetterling's testimony was corroborated generally by that of Mrs. Vetterling. (R. 190-192.)

Somewhat similar testimony with respect to the petitioners' 1951 and 1952 returns was given by one Danforth, who, like Vetterling, had had formal education in accounting and many years of accounting experience. (R. 134, 170.) Danforth, formerly a brother-in-law of petitioner Paul Moore, testified that he had kept their books, assisted by petitioner Viola Moore, from June, 1951, to June, 1954 (R. 134-136, 138, 164); that he had kept them accurately, based on the information given him by petitioners, and had balanced them every month (R. 139); that he had prepared the 1951 and 1952 tax returns (R. 140, 150); that he had understated income and overstated expenses on the returns because petitioners had told him they "didn't think that the books as posted were correct" (R. 144); that each year he had re-arranged the figures to show the profit petitioners wanted to report, *i.e.*, about the same amount they had reported for the prior year (R. 147, 150-151); that he had made no attempt to verify the statements made to him by petitioners and had

made no adjusting entries on the books (R. 148); that he had known when he prepared the returns that they were not in agreement with the books, and had warned petitioners of this fact (R. 142, 149); and that he "felt that everything [he] did [he] was trying to do it just as they would do it themselves if they would" (R. 151).

The defense offered evidence that petitioners had a good reputation for truth and veracity and a good reputation as law-abiding citizens. Petitioners also took the witness stand. They flatly denied the testimony of Mr. and Mrs. Vetterling and claimed that they had relied in good faith upon both Vetterling and Danforth to prepare proper income tax returns. (R. 263-272, 278-284, 317-328.)

The trial judge refused to give the following requested instruction on character evidence (R. 423):

> You are instructed that good character, when considered in connection with other evidence in this case, may generate a reasonable doubt. The circumstances may be such that established reputation for good character, if it's relevant to the issue, would alone create a reasonable doubt, although, without it, other evidence would be convincing.

The court charged that the testimony as to petitioners' good character was evidence in their favor, and that it (R. 445):

> * * * is competent testimony and that you shall take it and consider it, and give it such weight as appeals to your judgment under your oaths as jurors, and when considered in connection with

all of the testimony in the case, if you are not then satisfied beyond a reasonable doubt of the guilt of the defendants of the charges against them, it is your duty to acquit them.

ARGUMENT

1. There is no merit in the contention (Pet. 6-8) that the trial court erred in refusing to give the requested instruction on character evidence (*supra*, p. 7). That instruction was taken from language in *Edgington* v. *United States*, 164 U. S. 361, 366.[2] But it cannot properly be said, as petitioners assert (Pet. 6), that "the Court of Appeals in this case is in conflict" with *Edgington*. All that this Court said in *Edgington* was that the "circumstances *may be such* that an established reputation for good character * * * would alone create a reasonable doubt * * *" (164 U. S. at 366; emphasis added). This Court has repeatedly refused to review cases in which it has been contended that denial of a request to instruct in the language of *Edgington* required reversal. *Le More* v. *United States*, 253 Fed. 887, 894 (C.A. 5th), certiorari denied, 248 U. S. 586; *Kaufmann* v. *United*

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[2] In *Edgington* this Court stated (164 U.S. at 366):

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

States, 282 Fed. 776 (C.A. 3d), certiorari denied, 260 U. S. 735; *Kreiner* v. *United States*, 11 F. 2d 722, 726 (C.A. 2d), certiorari denied, 271 U. S. 688 (construing *Edgington* to mean that the value of evidence of good character is not confined to doubtful or conflicting cases); *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 639 (C. A. 2d), certiorari denied, 329 U. S. 742 (concluding that the *Edgington* case holds that the trial court must not tell the jury to consider character evidence only when the scales are already in balance); *Baugh* v. *United States*, 27 F. 2d 257, 261 (C. A. 9th), certiorari denied, 278 U. S. 639 (holding that, in the circumstances presented, to charge a jury in the language of *Edgington* would be "to accentuate and give undue prominence" to character evidence); *Schcib* v. *United States*, 14 F. 2d 75 (C. A. 7th), certiorari denied, 273 U. S. 701; *Haffa* v. *United States*, 36 F. 2d 1 (C. A. 7th), certiorari denied, 281 U. S. 727; *Boehm* v. *United States*, 123 F. 2d 791, 812 (C. A. 8th), certiorari denied, 315 U. S. 800 (holding that, under the circumstances there present, no one could have honestly believed that proof of defendant's reputation, standing alone, could raise a doubt of his guilt); *Poliafico* v. *United States*, 237 F. 2d 97, 114 (C. A. 6th), certiorari denied, 352 U. S. 1025 (holding that under the doctrine of *Edgington* it is proper to charge that character evidence should be considered together with the other evidence in arriving at a verdict). See also *Nash* v. *United States*, 54 F. 2d 1006, 1007 (C. A. 2d), certiorari denied, 285 U. S. 556; *United States* v. *Kelley*, 105 F. 2d 912, 918 (C. A. 2d); *Gariepy* v. *United*

States, 220 F. 2d 252, 261 (C. A. 6th), certiorari denied, 350 U. S. 825; *Grace* v. *United States*, 4 F. 2d 658 (C. A. 5th), certiorari denied, 268 U. S. 702.[3]

It was said in *Michelson* v. *United States*, 335 U. S. 469, 476, that evidence of a reputation for good character "alone, *in some circumstances*, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a *proper* case should be so instructed." (Emphasis added.) We do not construe this as extending the *Edgington* doctrine.[4]

Moreover, we submit that the instant case, in any event, is one peculiarly inappropriate for further review. The charge as given (*supra*, pp. 7-8) left the jury free to acquit on any reasonable doubt, however it may have been engendered, and the direct proof of each element of the offense (*supra*, pp. 4-7), if

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[3] There is no real conflict between the instant case and *Hayes* v. *United States*, 227 F. 2d 540 (C. A. 10th) (see Pet. 7). In *Hayes*, the conviction was reversed on the ground of a clearly erroneous instruction (quite unlike the one given in the case at bar) on character evidence wherein the trial judge betrayed a lack of understanding of the function of reputation and character evidence by emphasizing repeatedly that the character witnesses had said nothing about the facts of the case. To the same effect as *Hayes*, see *Greer* v. *United States*, 227 F. 2d 546 (C.A. 10th).

As the Court of Appeals pointed out in the instant case (Pet. 25-26), *Holland* v. *United States*, 245 F. 2d 341, 343 (C. A. 5th), represents no more than a temporary aberration in the Fifth Circuit resulting from the overlooking of the earlier cases of *LeMore* v. *United States*, 253 Fed. 887 (C. A. 5th), certiorari denied, 248 U. S. 586; and *Grace* v. *United States*, 4 F. 2d 658 (C. A. 5th), certiorari denied, 268 U. S. 702.

[4] *Cf. United States* v. *Lowenthal*, 224 F. 2d 248, 249 (C. A. 2d); *Palacios* v. *United States*, *supra*.

believed, left no room for such a doubt. Assuming that it would have been proper to give the requested instruction in this case, the Court of Appeals was plainly right in stating (Pet. 26):

> In this record with its devastating facts, both direct and circumstantial, we would not have reached a conclusion that any such difference in the wording between the requested and given instructions could have had any harmful effect.

2. Also without merit is the argument (Pet. 8-10) that the trial judge erred in defining reasonable doubt to the jury as follows (R. 455):

> Now, gentlemen, a reasonable doubt is what the term implies, is a doubt founded upon reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason. If, having weighed the evidence on both sides, you gentlemen reach the conclusion that the defendant or defendants are guilty to that degree of certainty that would lead you to act on the faith of it in the more important and critical affairs of your own life, you may properly convict; otherwise not.

The term "reasonable doubt" conveys its own meaning, and efforts to simplify or elucidate its meaning more fully "do not usually result in making it any clearer to the minds of the jury." *Miles* v. *United States*, 103 U. S. 304, 312; *Dunbar* v. *United States*, 156 U. S. 185, 199. Accordingly, a further definition is not ordinarily required. *Hopt* v. *Utah*, 120 U. S.

430, 440, and, when given, need not follow any fixed or inflexible formula. *Dunbar* v. *United States*, *supra*; 9 Wigmore, *Evidence* (3d ed.), Sec. 2497. An instruction is ordinarily held sufficient if the jury is given to understand that a reasonable doubt is one having a rational basis, rather than one depending merely upon whim or speculation. *United States* v. *Klock*, 210 F. 2d 215 (C. A. 2d), certiorari denied, 347 U. S. 960; *Williams* v. *United States*, 208 F. 2d 447 (C. A. 5th), certiorari denied, 347 U. S. 928; *Murphy* v. *United States*, 33 F. 2d 896 (C.A. 3d), certiorari denied, 280 U. S. 584. Measured by this standard, the trial judge's explanation of reasonable doubt in the case at bar was adequate and appropriate.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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